

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

76-5028

UNITED STATES COURT OF APPEALS
for the

SECOND CIRCUIT

In the Matter of

UNISHOPS, INC.,

Debtor

JEROME ZELIN,

Claimant-Appellant,

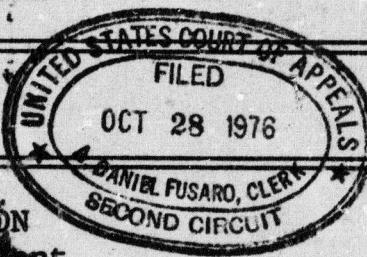
-against-

UNISHOPS, INC.,

Debtor-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



NATANSON, REICH & BARRISON
Attorneys for Claimant-Appellant
655 Third Avenue, New York, N.Y. 10017
(212) 490-3470

LEVIN & WEINTRAUB
Attorneys for Debtor-Appellee
255 Broadway, New York, N.Y. 10007
(212) 962-3300

(5700)

PAGINATION AS IN ORIGINAL COPY

INDEX

	<u>Page</u>
STIPULATION OF PARTIES AS TO CONTENTS OF APPENDIX	A-1
BANKRUPTCY DOCKET	A-2
PROOF OF CLAIM BY JEROME ZELIN FOR ADMINISTRATION EXPENSES	A-8
EXHIBIT TO PROOF OF CLAIM - EMPLOY- MENT AGREEMENT	A-10
MOTION TO EXPUNGE OR RECLASSIFY CLAIMS	A-12
AGREED STATEMENT OF FACTS	A-17
OPINION OF BABITT, J., BANKRUPTCY JUDGE	A-20
ORDER OF BABITT, J. OVERRULING OBJECTIONS AND ALLOWING CLAIM #2246 AS AN EXPENSE OF ADMINISTRATION	A-35
NOTICE OF APPEAL OF UNISHOPS, INC. TO DISTRICT COURT	A-37
OPINION OF GRIESA, J. IN DISTRICT COURT	A-38
NOTICE OF APPEAL OF JEROME ZELIN TO UNITED STATES COURT OF APPEALS	A-46

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
In the Matter of

UNISHOPS, INC.,

73 B 1208

Debtor,

STIPULATION RE CONTENTS
OF JOINT APPENDIX

JEROME ZELIN,

Claimant-Appellant,
-against-

UNISHOPS, INC.,

Debtor-Appellee.

-----x

It is hereby stipulated by and between the
attorneys herein that the Joint Appendix shall contain
only such papers as are referred to in the attached
index or table of contents.

Dated: September 13, 1976

NATANSON, REICH & BARRISON
Attorneys for Claimant-
Appellant

By Joseph A. Natanson

a Power

LEVIN & WEINTRAUB
Attorneys for Debtor-Appellee

By Eduard Levin

BANKRUPTCY DOCKET

NAME OF BANKRUPT/DEBTOR THE BISHOPS, INC.			DIST. NO. BK8	DIV. NO. 73 B 1205	DOCKET NO.	
			CHAPTER OR SECTION XII-322	CHECK IF <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Voluntary <input type="checkbox"/> Involuntary <input type="checkbox"/> Fee paid in installments <input type="checkbox"/> Corporation	
			DATE PETITION FILED 11/30/73	DATE CLOSED	<input checked="" type="checkbox"/> Former <input type="checkbox"/> Employee <input type="checkbox"/> Professional <input type="checkbox"/> Other (Non-business) <input type="checkbox"/> Merchant <input type="checkbox"/> Manufacturer <input checked="" type="checkbox"/> Other (Business)	
			DIS-CHARGE <input checked="" type="checkbox"/> Granted <input type="checkbox"/> Denied <input type="checkbox"/> Waived or not applied for	DATE DISCHARGED	PETITION DATE DISMISSED DISMISSED? <input type="checkbox"/> YES NAME OF JUDGE ROY DSBITZ	
			TOTAL \$	PRIORITY \$	SECURED \$	UNSECURED \$
NO ASSET CASES ONLY CLAIMS AS SCHEDULED	NAME AND ADDRESSES LEVIN & WEINTRAUB, 225 Broadway, N.Y., N.Y. 10007. Tel. # (212) 964-0933					
ATTORNEY FOR BANKRUPT OR DEBTOR						
ATTORNEY FOR PETITIONING CREDITORS						
RECEIVER						
ATTORNEY FOR RECEIVER						
TRUSTEE						
ATTORNEY FOR TRUSTEE						
CHANGES OF PRINCIPALS						
DATE	PROCEEDINGS					
11/30/73	Filed Petition in proceedings under Chapter XII-322, List of Creditors, Summary of Assets and Liabilities, Statement of Executory Contracts and Affidavit under Rule XII-2. (10) Largest Creditors. Referred to: BANKRUPTCY JUDGE DSBITZ.					
12/5/73	Received from Referee CERTIFIED COPY of application and Order authorizing Debtor in possession to operate business, etc. Dated: 11/30/73.					

BANKRUPTCY DOCKET

2/15/74 Received from Bankruptcy Judge, NOTICE OF APPEAL TO DISTRICT COURT (ROGERS WHOLESALERS, INC. from the order of HON. ROY BABITT, DATED: 12/13/73. ETC. RET. TUESDAY, FEBRUARY 26TH, 1974 AT 10:30 A.M. in Room No. 506. BROWN FOLDER TO BE RETURNED.

2/15/74 Received from Bankruptcy Judge, NOTICE OF APPEAL TO DISTRICT COURT (THE DEBTOR AND DEBTOR-IN-POSSESSION) from the order of HON. ROY BABITT, DATED: 12/13/73. ETC. RET. TUESDAY, FEBRUARY 26TH, 1974 at 10:30 A.M. in Room No. 506.
(Notices mailed to all respective attorneys mentioned on both appeals)

2/19/74 Filed Appellants' Memorandum of Law with affidavit of service re:application of debtor-and debtor-in-possession dated:12/12/73 sub. by: Levin and Weintraub, attorneys for debtor and debtor-in-possession, Dated:2/14/74.

2/20/74 Filed Appellant's memorandum of law-sub. by: Willkie Farr and Gallagher, attys. for appellant, Rogers Wholesalers, Inc. and dated: 2/19/74.

2/20/74 Received from Bankruptcy J. Designation of additional papers for inclusion gn the record on appeal.. Dated:2/14/74

2/21/74 Filed Memorandum in support of Motion of Action Industries, Inc. and in response to appellants (Unishops Memorandum of Law. sub. by Kaufman and Harris.

3/31/74 Filed Appellee, AC & R Advertising Inc."s Memorandum of Law. sub. by: Taylor, Ferencz and Simon, Attorneys for Appellee, Dated: 2/20/74.

2/20/74 Filed Schedules and Statement of Affairs. ORIGINAL AND COPY TO BANKRUPTCY JUDGE.

2/22/74 Filed Memorandum of law of appellee MANOW INTERNATIONAL CORP. sub. by: Hess Segall, Popkin Guterman Pelz and Steiner, Attys. for appellee.

2/22/74 Filed Memorandum of law of the respondent-Brunswick Corporation sub. by: Blumber, Singer, Ross, Gottesman and Gordon, attorneys for Respondent.

2/22/74 Filed Memorandum of law of Mitsubishi International Corporation, sub. by: Abraham, Koenig and Silver, attorneys for Respondent.

2/25/74 Received from Bankruptcy J. Memorandum of Law preliminary statement by: Murray A. Gordon, attorneys for Retread Distributors, Inc. Dated: 2/20/74.

2/25/74 Filed Memorandum of law of Appellee Robers Wholesalers, Inc. sub. by: Willkie Farr and Gallagher, Attorneys for ?Appellee, Dated:2/21/74.

CONTINUED ON PAGE 3.

BANKRUPTCY DOCKET

PAGE 3.

UNISHOPS, INC.

73 B 1208

DOCKET NUMBER

DATE	PROCEEDINGS
3/4/74	Filed MEMORANDUM AND ORDER-----the decision of the Bankruptcy Judge is in all respects affirmed. The limited stay imposed by this Court at the hearing on February 28th 1974 is hereby continued for an additional period of 10 days from date hereof, within which time the debtor in possession, if so advised, may apply to the Court of Appeals for a further stay, or for an expedited hearing of an appeal, or both. So Ordered: JUDGE BRIENT DATED: 3/4/74. (SEE MEMO-ORDER FOR FULL DETAILS) COPY TO BANKRUPTCY J.
3/5/74	Filed MEMO-ENDORSED---The learned Bankruptcy Judge was correct. Appellant's motion was and is moot. See our Memorandum and Order filed today upon the Appeal of the Debtor in possession and the order appealed from is affirmed. So Ordered. JUDGE BRIENT, DATED: 3/4/74. BROWN FOLDER RETURNED TO BANK: RUPTCY J.
3/5/74	Filed Memorandum of law of appellee, Arrow Group Industries Inc. sub. by: Whitman and Ransom, attorneys for Appellees, Arrow Group Industries, Inc. and Chromalloy American Corp.
NOTE:	(ALL PAPERS PERTAINING TO (2) APPEALS ARE ON FILE WITH THE BANKRUPTCY J...ONLY ORIGINAL MEMORANDUM AND ORDER OF JUDGE BRIEANT IN OUR FILE.)
3/8/74	Filed NOTICE OF APPEAL TO COURT OF APPEALS from the Order of JUDGE BRIEANT affirming order of Bankruptcy Judge, BABITT, entered 2/6/74 denying the application of the debtor and debtor in possession dated: 12/12/73, ETC. sub. by: Levin and Weintraub, Attorneys for Appellants, Dated: 3/5/74 and Notices mailed to: ALL PARTIES SET FORTH IN ANNEXED SCHEDULE, THIS DATE. (32 Notices)
3/13/74	Filed Notice of the record on appeal in above entitled matter has been Certified and transmitted to the USCA for the Second Circuit this 13th day of March 1974.
4/9/74	Filed NOTICE OF APPEAL re Order of Bankruptcy Judge, BABITT on: 3/19/74 et al. RET. APRIL 16th, 1974 (TUESDAY) at 10:30 A.M. in Room No. 506.
4/11/74	Filed Appellee's Memorandum of Law by Levin & Weintraub, Attys. for the Appellee.
4/11/74	Filed Notice of Motion to dismiss Appeal, Re; affidavit of Michael J. Crames. By Michael J. Crames, Member of the firm of Levin & Weintraub, Attys. for Debtor in Possession. Sworn to: 4/9/74.
4/16/74	Filed Brief of Bankers Trust Company, Respondent, sub. by: Moses and Singer, Attorneys for Bankers Trust. f.

CONTINUED ON PAGE 4.

BANKRUPTCY DOCKET

PAGE 4.

UNISHOPS, INC.

73 B 1208

DATE	PROCEEDINGS
4/16/74	Filed Appellant's Brief sub. by: Robert P. Herzog, Attorneys for Appellant. f., Jules Teitelbaum, Esq. Norman Klasfeld, of counsel.
4/16/74	Filed Affidavit of Robert P. Herzog in opposition to Motion to Dismiss Appeal by: R.P. Herzog, attorney for Vick Chemical Co. and sworn to: 4/11/74.
4/22/74	Filed MEMORANDUM AND ORDER re: Order of Bankruptcy J. Roy Babitt, approving and confirming a sale by a Chapter XI debtor in possession, Unishops, Inc. and its wholly owned subsidiary Nescott, Inc., to Adams Drug Co. Inc. of furniture, fixtures, etc.. The motion to dismiss this appeal is denied. The case is hereby remanded to the Bankruptcy Court with instructions to vacate the Endorsement and Order of March 19, 1974; to take whatever expedited steps the Referee views as necessary to permit reassessment of the jurisdictional issues in light of Nescott's Chapter XI proceeding; and to enter an appropriate new Order with respect to the proposed sale to Adams, forthwith. So ORDERED. JUDGE PIERCE, DATED: 4/22/74. COPY TO JUDGE BABITT. (SEE MEMORANDUM AND ORDER FOR FULL DETAILS.)
7/11/74	Filed TRUE COPY of Appeal from USDC that that ORDER is affirmed with costs to be taxed against the appellant. A. Daniel Fusare, cl. NOTICEES MAILED TO: Robert P. Herzog, Attorney for Appellant - 285 Madison Avenue, New York, N.Y. 10016, and Levin and Weintraub, Atty. for Debtor. 225 Broadway, New York, N.Y. 10017. COPY TO BANKRUPTCY JUDGE, BABITT.
5/8/75	Filed HON. BABITT'S Application and order approving agreement with ACTION INDUSTRIES, INC. dated: 5/5/75 AND Filed MEMO ENDORSED re: above..... So Ordered. JUDGE LASKER, DATED: 5/8/75. (ORIGINAL FORWARDED TO BANKRUPTCY J. BABITT) COPY FOR D.C. FILE.
5/8/75	Filed Answer of Defendant Carter-Wallace Inc. Sub By: Atty for defendant.
10/15/75	Filed NOTICE OF APPEAL to the district court by the debtors from an order entered in this case on 8/6/75. RET: Nov. 25 1975 at 10:30 A.M. in room 506. f.
10/15/75	Filed DESIGNATION AND STATEMENT pursuant to rule 806. f.
10/15/75	Filed CROSS-DESIGNATION DEBTOR-APPELLANTS of Issues to be presented by all appellants. f.
10/15/75	Filed NOTICE OF APPEAL to the district court by the claimants of 143 Estates, Inc. et al from the order of 8/6/75. RET: Nov. 25, 1975, at 10:30 A.M. in room 506. f.
10/15/75	Filed DESIGNATION by Appellant 143 Estates, Inc. et al. f.
10/28/75	Filed MEMORANDUM OF LAW OF CLAIMANT-APPELLANT. Sub by RUBEN SCHWARTZ & SILVERBERG. f
11/17/75	Filed DEBTOR'S MEMORANDUM OF LAW, Sub By: Levin & Weintraub. f.

CONTINUED ON PAGE 5

BANKRUPTCY DOCKET
UNISHOPS, INC.

PAGE 5

73 B 1208

DATE	PROCEEDINGS	DOCKET NUMBER
11/25/75	Filed STIPULATION & ORDER adjourning hearing on Bankruptcy Appeal from 11/25/75 to 12/9/75. So ordered Ward, J. dated 11/24/75. f.	
12/2/75	Filed STIPULATION adjourning the appeal hearing now set for 12/9/75 is adjourned to 12/23/75. So Ordered Metzner, J. dated 12/1/75.	
12/10/75	Filed Notice of Appeal to the District Court By: Kenneth Nemeroff and Murry Nemeroff from the order of Judge Babitt dated 9/17/75. RET: 1/20/76 at 10:30 in room 506. f.	
12/10/75	Filed Designation for record on appeal. f.	
12/24/75	Filed NOTICE OF APPEAL, of Unishops Inc, to the USDC from the order of Bahk Judge Babitt dated 9/4/75. RET: 2/3/76 at 10:30 A.M. in room 506. f.	
12/24/75	Filed Designation of Additional papers to be included in record. f.	
12/29/75	Filed CLAIMANT'S MEMORANDUM ANSWERING DEBTORS'. MEMORANDUM Sub. by Ruben Schwartz & Silverberg. f.	
1/21/76	Filed STIPULATION EXTENDING TIME AND adjourning argument to March 9, 1976. So ordered Frankel, J. dated 1/20/76.	
1/21/76	Filed STIPULATION ADJOURNING APPEAL to 2/19/76. f. (Nemeroff and Nemeroff) So ordered Frankel, J. dated 1/21/76. f.	
1/29/76	Filed MEMORANDUM DECISION #43805, the decision is affirmed as to Claim NO. 2304, reversed as to Claim No. 3 and remanded on Claim No. 2305 for further proceedings if any should be required. So ordered Frankel, J. dated 1/29/76. M/N? Ruben Schwartz, Silverberg, 450 Seventh Avenue, N.Y.N.Y. 10001, Weil Gotshal & Manges, 767 5th Avenue, N.Y.N.Y. 10022, Levin & Weintraub, 225 B'way N.Y.N.Y. & Judge Babitt, 40 Foley Sq.N.Y.N.Y. Copy to Bankruptcy Judge.	
2/13/76	Filed APPELLANT'S MEMORANDUM, RE: Jerome Zelin.	
2/18/76	Filed STIPULATION extending time and adjourning argument (Nemeroff) to 3/23/76. So ordered Motley, J. dated 2/13/76. f/	
2/24/76	Filed NOTICE OF APPEAL to the USCA from the order of Judge Frankel dated 1/29/76 by 143 Estates. M/N. f.	
3-2-76	Filed reply and supplemental memorandum of law of claimants in opposition to debtor's motion objecting to claims 3, 2304 & 2305.	

BANKRUPTCY DOCKET

PAGE 6

UNISHOPS, INC.

73 B 1208

DATE	PROCEEDINGS
3-2-76	Filed memorandum of law to reclassify administration claims of 143 estates, et al
3-2-76	Filed memorandum of law of claimants in opposition to debtors motion objecting to claims 3, 2304 and 2305..
3/3/76	Filed Notice that the Original Record is being transmitted to the USCA.
3/3/76	Filed STIPULATION extending time and adjourning argument to 3/23/76 at 10:30 A.M. So ordered Pollack, J. dated 3/2/76. f. (JEROME ZELIN)
3/3/76	Filed STIPULATION extending time and adjourning argument to 4/6/76. f. (NEMEROFF AND NEMEROFF). So ordered Pollack J. dated 3.2.76.
3/22/76	Filed APPELLANT'S REPLY MEMORANDUM, f.
4/5/76	Filed STIPULATION extending time and adjourning argument to 4/27/76. So ordered Griesa, J. dated 4/1/76. f. (Nemerooff)
4/28/76	Filed STIPULATION & ORDER extending time and adjourning argument to June 8, 1976. (Nemerooff) So ordered MacMahon. dated 4/26/76. f.
6/1/76	Filed APPELLEE'S MEMORANDUM, Sub By: Levin & Weintraub.
6/22/76	Filed MEMO-ENDORSED on back of the Notice of Appeal dated 12/10/75. The Decision appealed from is affirmed on the opinion of Judge Babitt. So ordered Knapp, J. dated 6/21/76. Copy to Bank Judge, M/N: ARANOW, BRIDSKY BOHLINGER BENETAR & EINHORN, 469 Fifth Avenue, N.Y.N.Y., Levin & Weintraub, 225 B'way N.Y.N.Y. & Judge Babitt 40 Foley Sq. N.Y.N.Y.
8/2/76	Filed OPINION # 44909, the decision and order of Bankruptcy Judge Babitt allowing Zelin's claim for severance pay as an administrative expense are reversed, so ordered Griesa, J. dated 8/2/76 Copy to Bank Judge. M/N; Aranow Brodsky Bohlinger Benetar & Einhorn, 469 Fifth Avenue NYC. Levin & Weintraub 225 B'way, NYC & Judge Babitt, 40 Foley Sq. NYC.
8/12/76	Filed BOND in the sum of \$250.00 for undertaking costs on appeal, by Fireman Fund, American Insurance Companies. Copy to Bank Judge/
8/13/76	Filed NOTICE OF APPEAL to the USCA from the order of the District Court dated 8/2/76 by Jerome Zelin. M/N; f.

PROOF OF CLAIM BY JEROME ZELIN FOR
ADMINISTRATION EXPENSESUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter	:	In Proceedings for
	:	an Arrangement
of	:	73 B 1208
	:	
UNISHOPS, INC. et al.,	:	PROOF OF CLAIM FOR EXPENSES
	:	OF ADMINISTRATION
Debtors.	:	

-----X

Jerome Zelin, 225 Arkansas Drive, Brooklyn, Kings
County, New York, says:

1. I am the Claimant in this proof of claim.

2. Unishops, Inc., one of the above named debtors in possession, is justly and truly indebted to Claimant in the sum of \$100,000, which indebtedness constitutes an expense of administration.

3. The consideration of the debt or liability is as follows:

3.01 Claimant was employed by Unishops, Inc. pursuant to a written agreement dated March 19, 1973, made by it with Claimant (the "Employment Agreement") prior to this proceeding.

3.02 Unishops, Inc., as a debtor in possession, terminated the Employment Agreement on July 16, 1974 by discharging the Claimant.

3.03 By reason of the discharge, there became

PROOF OF CLAIM BY JEROME ZELIN FOR
ADMINISTRATION EXPENSES

due to Claimant, under the terms of the
Employment Agreement, severance pay in the
sum of \$100,000.

4. No part of the debt or liability has been paid.

5. There are no set-offs or counterclaims to the
debt or liability.

6. Claimant does not hold and has not, nor has any
person by claimant's order or to his knowledge or belief, for
claimant's use, had or received any security or securities for the
debt or liability.

7. A photocopy of the Employment Agreement is
attached to and made part of this proof of claim. The original
thereof will be filed if required by the Court.

Dated: New York, N.Y.
December 18, 1974

/S/

Jerome Zelin

EXHIBIT TO PROOF OF CLAIM - EMPLOY-
MENT AGREEMENT**UNISHOPS, INC.**

21 CAVEN POINT AVE., JERSEY CITY, N.J. 07305 • NEW JERSEY: 433-0100 • NEW YORK: 349-0380

March 19, 1973

Jerome Zelin, Esq.
Unishops, Inc.
21 Caven Point Avenue
Jersey City, New Jersey 07305

Dear Mr. Zelin:

We refer to the discussions with you concerning the payment to be made to you by Unishops, Inc. (the "Company") in the event of the termination of your employment with the Company under the circumstances referred to in the following paragraph.

In this regard and in consideration of your agreeing to continue at this time as Chief Operating Officer, we confirm that, if your employment with the Company is terminated at any time for any reason other than

- (a) your death, or
- (b) your voluntary resignation,

the Company will pay to you, on a monthly basis commencing on the first day of the month following the month in which such termination occurs, \$50,000 a year for a period of two years, aggregating \$100,000. If you should die after you shall have become entitled to such payment, but before the entire sum of \$100,000 has been paid to you, the Company will pay to your estate, or to whomsoever you may direct in writing, any unpaid balance of such \$100,000.

If you should voluntarily resign, either because of a diminution or material change in the character of your duties as Chief Operating Officer or a diminution of your

EXHIBIT TO PROOF OF CLAIM - EMPLOY-
MENT AGREEMENT

Jerome Zelin, Esq.

-2-

March 19, 1973

responsibilities or salary, or because the location at which your services are to be rendered is changed to a location outside of the New York metropolitan area, such resignation shall not be deemed to be a voluntary resignation for the purpose of this agreement with the consequence that you will, under such circumstances, be entitled to the payments provided for hereunder.

This letter has been executed by the Company pursuant to authority of the Board of Directors and when accepted by you will constitute an agreement between us and shall be binding upon, and inure to the benefit of, you and your heirs and legal representatives and shall be binding upon and inure to the benefit of, the Company and its successors and assigns, whether by consolidation, merger, sale of assets or otherwise.

If the foregoing terms and conditions correctly embody your mutual understanding with the Company, kindly endorse your acceptance and agreement therewith in the space below provided, whereupon this shall become a binding agreement between us.

Very truly yours,

UNISHOPS, INC.

By Silvert Berk

ACCEPTED AND AGREED TO AS OF
THE DATE FIRST ABOVE SET FORTH.

Jerome Zelin

MOTION TO EXPUNGE OR RECLASSIFY CLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

OF

UNISHOPS, INC.,	:	
UNISHOPS OF STARS, INC.	:	
UNISHOPS OF MODELL'S, INC.,	:	
UNISHOPS OF CLARKINS, INC., also d/b/a CLARK WHOLESALE CO.,	:	
GOLDFINE'S INC. also d/b/a	:	
GOLDFINE'S "BY THE BRIDGE",	:	
NESCOTT, INC.,	:	In Proceedings for
TERIL STATIONERS, INC.,	:	an Arrangement No.
J. Z. SALES CORP.,	:	73 B 1208
CENTRAL TEXTILE, INC., formerly known as UNISHOPS OF CENTRAL TEXTILE, INC.,	:	<u>MOTION TO EXPUNGE OR</u>
BOBBIE SUE, INC., also doing business as FAMOUS FASHIONS,	:	<u>RECLASSIFY CLAIMS</u>
PERRY'S SHOES, INC., also doing business as PIC 'N SHOE,	:	
WHITE DEPARTMENT STORES, INC.,	:	
formerly known as WHITE AT MASSAPEQUA, INC.,	:	
UNIQUIP, INC.,	:	
UNISHOPS OF GIANT AUTOMOTIVE, INC.,	:	
SICKELS-LODER, INC.,	:	
MODELL'S SHOPPERS WORLD OF TRENTON, INC.,	:	
CLARKINS AT YOUNGSTOWN, INC.,	:	
MODELL'S SHOPPERS WORLD OF EAST BRUNSWICK, INC.,	:	
MIDDLETOWN CENTER, INC.,	:	
WHITE SHOPPING CENTER, INC.,	:	
Debtors	:	

S I R S:

PLEASE TAKE NOTICE, that the debtors and debtors in possession object to the claims set forth in the schedule annexed hereto and made a part hereof for the reason that there is either no money due such claimants, or their claims are general unsecured claims and not administration claims. Debtors and debtors in possession therefore seek an order expunging said claims or in the alternative, reclassifying them as general unsecured claims in their entirety.

MOTION TO EXPUNGE OR RECLASSIFY CLAIMS

PLEASE TAKE FURTHER NOTICE, that a hearing on said objections to claims will be held before Honorable Roy Babitt, Bankruptcy Judge, at the United States Courthouse, Foley Square, Room 201, New York, N.Y., on the 9th day of April, 1975, at 8:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard for an order granting the relief herein requested and such other and further relief as is just.

Dated: New York, New York
March 27, 1975

LEVIN & WEINTRAUB, Attorneys
for Debtors & Debtors in
Possession Office & P.O. Address
225 Broadway
New York, New York 10007

TO: THE CREDITORS NAMED IN
THE ANNEXED SCHEDULE

MOTION TO EXPUNGE OR RECLASSIFY CLAIMS

<u>Claim No.</u>	<u>Debtor Proceeding</u>	<u>Name & Address of Creditor</u>	<u>Amount of Claim</u>
1	Modell's Shoppers World of East Brunswick, Inc.	Ridge Realty Co. c/o A. Leon Kohlreiter 152 Market Street Paterson, N.J.	\$ 48,020.45
11	Nescott, Inc.	Knemark, Inc. 132-20 Merrick Blvd. Jamaica, New York	909.99
388	Unishops, Inc.	Puritan Lighting Fixture Co., Inc. 43-11 51st Street Woodside, N.Y. Atty: Stephen B. Schulman 101 Clinton Avenue, Mineola, N.Y.	591.52
515	Unishops, Inc.	Lester P. Fink 1782 Manchester Street Crosse Pointe Woods, Mich. 48236	2,025.00
1462	Unishops, Inc.	Retail Store Employees Union AFL-CIO Drug & Mercantile Employees Pension Fund 2550 W. Grand Blvd. Detroit, Michigan	600.00
1463	Unishops, Inc.	Retail Store Employees Union AFL-CIO Drug & Mercantile Employees Welfare Fund 2550 W. Grand Blvd. Detroit, Michigan	693.93
2038	Unishops, Inc.	Ridge Realty Co. c/o A. Leon Kohlreiter 152 Market Street Paterson, New Jersey 07505	48,020.46
2041	Unishops, Inc.	Welfare Trust Fund No. 1146 342 Madison Avenue New York, N.Y. Attys: Brotmann, Kornreich, Shore & Hecht 500, 5th Avenue, N.Y.C.	1,224.00

MOTION TO EXPUNGE OR RECLASSIFY CLAIMS

<u>Claim No.</u>	<u>Debtor Proceeding</u>	<u>Name & Address of Creditor</u>	<u>Amount of Claim</u>
2220	Unishops, Inc.	Lawrence Kadish c/o Robert P. Herzog 185 Madison Avenue New York, New York	\$242,108.47
2222	Unishops, Inc.	First Fiscal Fund, Corp. c/o Robert P. Herzog 185 Madison Avenue New York, New York	298,108.47
2238	Unishops, Inc.	Seymour Brown 71 Springbrook Road Livingston, New Jersey Attys: Schwartz, Bruns, Lesser & Jacoby 445 Park Avenue, New York, N.Y.	20,000.08
2244	Unishops, Inc.	Kenneth Nemeroff 7 Claverton Court Melville, New York Attys: Aranow, Brodsky, Bohlinger, Benetar & Einhorn 469 5th Avenue, New York, New York	12,250.00
2245	Unishops, Inc.	Murray Nemeroff 143 Mott Cove Road South Roslyn Harbor, New York Attys: Aranow, Brodsky, Bohlinger, Benetar & Einhorn 469 5th Avenue New York, New York	21,000.00
2246	Unishops, Inc.	Jerome Zelin 225 Arkansas Drive Brooklyn, New York Attys: Aranow, Brodsky, Bohlinger, Benetar & Einhorn 469 5th Avenue New York, New York	100,000.00

MOTION TO EXPUNGE OR RECLASSIFY CLAIMS

<u>Claim No.</u>	<u>Debtor Proceeding</u>	<u>Name & Address of Creditor</u>	<u>Amount of Claim</u>
3	Middletown Center, Inc.	143 Estates, Inc. 111 Broadway New York, N.Y. Attys: Ruben, Schwartz & Silverberg 450 Seventh Avenue, New York City	42,050.00
2304	Unishops, Inc.	143 Estates, Inc. 111 Broadway New York, N.Y. Attys: Ruben, Schwartz & Silverberg 450 Seventh Avenue New York City	417,000.47
2305	Unishops, Inc.	143 Estates, Inc. 111 Broadway New York, N.Y. Attys: Ruben, Schwartz & Silverberg 450 Seventh Avenue New York City	Unliquidated

AGREED STATEMENT OF FACTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN THE MATTER : In Proceedings for
OF : an Arrangement
UNISHOPS, INC. et al., : No. 73 B 1208
Debtors : AGREED STATEMENT OF
 FACTS
-----X

Jerome Zelin, the claimant ("Zelin") and Unishops, Inc., one of the above named debtors (the "debtor"), which is a debtor in possession in this proceeding, agree to the truth of the following facts, without prejudice to the right of either party to object to the relevancy or materiality of any thereof to the determination of the issue between them.

1. On or about March 19, 1973, the debtor entered into a letter agreement with Zelin. A true copy of that agreement is attached to Zelin's proof of claim.
2. On March 19, 1973 and for approximately eleven years prior thereto, Zelin was employed by the debtor.
3. There was no written agreement regarding said employment prior to March 19, 1973.
4. Zelin owned and now owns 35,900 of the debtor's shares, out of approximately 6,000,000 shares outstanding.

AGREED STATEMENT OF FACTS

5. The letter agreement of March 19, 1973 provides that if the debtor terminates Zelin's employment, the debtor will pay Zelin \$50,000 per year for two years on a monthly basis, payable in advance on the first day of each month.

6. The debtor filed a petition for arrangement under Chapter XI, Sec. 322 of the Bankruptcy Act on November 30, 1973 in the United States District Court for the Southern District of New York.

7. On November 30, 1973, by order of the Bankruptcy Court, the debtor was continued in the operation and management of its business as a debtor in possession.

8. Zelin was employed by the debtor in possession.

9. On or about December 5, 1973, the debtor in possession applied to the Bankruptcy Court for an order pursuant to local Rule XI-3, approving the employment of Zelin and others and fixing their compensation.

10. On December 7, 1973, an order was entered by the Bankruptcy Court authorizing the employment of Zelin by the debtor in possession and fixing Zelin's annual compensation at \$100,000, payable in monthly installments.

AGREED STATEMENT OF FACTS

11. On or about July 16, 1974, the debtor in possession discharged Zelin.

12. At the time of said discharge, Zelin was vice-chairman and chief operating officer of the debtor in possession.

13. An order was made by this Court dated December 3, 1974 directing that the agreement dated March 19, 1973 between Zelin and the debtor be deemed to have been terminated by the debtor on July 16, 1974.

14. No portion of the \$100,000 provided for in the March 19, 1973 agreement has been paid to Zelin by either the debtor or the debtor in possession.

Dated: April 30, 1975

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN
Attorneys for Jerome Zelin, Claimant

By /S/
George Natanson
a Partner

Date

LEVIN & WEINTRAUB
Attorney for Debtor and Debtor
in Possession

By /S/
Elias Mann
a Partner

Date

OPINION OF BABITT, J., BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In the Matter :
of :
UNISHOPS, INC. : 73 B 1208
Debtor : OPINION
-----X

Objection to Claim No. 2246 of :
Jerome Zelin :
-----X

APPEARANCES:

LEVIN & WEINTRAUB, ESQS.,
Attorneys for Debtor
225 Broadway
New York, New York
By: ELIAS MANN &
DANIEL ZIMMERMAN, ESQS.,
-of counsel-

ARANOW, BRODSKY, BOHLINGER,
BENETAR & EINHORN, ESQS.,
Attorneys for Claimant
469 Fifth Avenue
New York, New York
By: GEORGE NATANSON, ESQ.,
-of counsel-

ROY BABITT, Bankruptcy Judge:

OPINION OF BABITT, J., BANKRUPTCY JUDGE

The debtor in these Chapter XI arrangement proceedings, Sections 301 et seq., of the Bankruptcy Act, 11 U.S.C. Sections 701, et seq., objects to the claim filed against it by claimant, Jerome Zelin, in the amount of \$100,000. The legal basis for that claim which was assigned No. 2246 on the claims dockets of this court is that it is to be accorded administration expense status, which, by reason of the priority given claims with such status, means its amount must be paid in full under the scheme of Chapter XI. The debtor, not contesting the quantum, challenges its legal basis by insisting that it should be held a general claim in which case it is treated on a par with other general creditors and entitled to be paid the amount offered in the arrangement which is less than 50 per cent.

The controlling facts have been stipulated between the debtor and the claimant and may be summarized chronologically as follows:

Earlier on about March 19, 1973, the debtor, Unishops, Inc., entered into a letter agreement of employment

OPINION OF BABITT, J., BANKRUPTCY JUDGE

with the claimant, a long-time employee and the owner of about one-half of 1% of the debtor's shares. This was the first such written agreement between the parties. Its pertinent provisions call for annual payment to claimant of \$100,000, payable monthly over a two year period, upon his involuntary dismissal as chief executive officer by the debtor.

On November 30, 1973, the debtor filed its petition of arrangement under Chapter XI, Section 322 of the Act, 11 U.S.C. Section 722, in this court.

After filing the petition, the now debtor in possession, Section 342 of the Act, 11 U.S.C. Section 742, exercising the powers conferred on it by Section 343 of the Act, 11 U.S.C. Section 743, continued the claimant in its employ. On December 7, 1973, this court entered an order, pursuant to local Bankruptcy Rule XI-3, approving claimant's continued employment and fixing his compensation at \$100,000 per year, payable in monthly installments.

On or about July 16, 1974, eight months after the Chapter XI filing, the debtor in possession discharged

OPINION OF BABITT, J., BANKRUPTCY JUDGE

the claimant. Claimant, invoking his rights under the letter agreement, then filed his claim for \$100,000, asserting it as an administration expense, which, if so, entitles it to payment in full as an incident of the period following the filing of the Chapter XI by the debtor up to confirmation of its arrangement and emergence from Chapter XI, rehabilitated. Cf. Section 337 (2) of the Act, 11 U.S.C. Section 737(2), Rule 11-38 (a) read with Section 357(6), 11 U.S.C. Section 757 (6). Having been discharged post Chapter XI petition, claimant contends that the amount due under the letter agreement is thus post-petition severance pay entitled to administration status as defined in Section 64a (1) of the Act, 11 U.S.C. Section 104 a(1). Support is claimed for this position in Straus-Duparquet Inc. v. Local U. No. 3 Int. Bro. of Elec. Wkrs., 386 F. 2d 649 (2d Cir. 1967).

The debtor, while it does not resist the quantum of the claim, asserts a number of arguments in support of its objection contending that the claim should be given only general claim status and thereby on a par with such pre-petition claims entitled only to what the debtor's

OPINION OF BABITT, J., BANKRUPTCY JUDGE

arrangement promises.

For the reasons now set forth, I reject the debtor's arguments and hold that the claimant is entitled to severance pay as an expense of the administration with the result that his claim is allowed and the objection overruled.

The debtor's first argument is that the amount due under the letter agreement is really deferred compensation earned pre-petition and therefore provable as a pre-petition general claim and not severance pay incurred post-petition where it would be an administration expense.

Deferred compensation is a term of art, well defined within the intricate tapestry of the tax world. "Deferred compensation plans are generally structured and intended to shift the tax on salary from the year in which it is earned -- a year the employee is in a high tax bracket -- to a later year, usually a retirement year when his tax bracket is lower". Kess, The Kess Tax Planning Manual 1971-1972, Section 4.01, pp. 141-43 (1971). The basic and underlying premise of deferred compensation is that the total

OPINION OF BABITT, J., BANKRUPTCY JUDGE

amount earned during the work period is not fully paid until the end of the applicable contractual period. Logically, then, deferred compensation cannot exist unless a reasonable relationship exists between the work actually done and the compensation ultimately paid under the contract. No such reasonable relationship exists in this case.

Had the claimant worked one day, one month, or ten years under the letter agreement, any involuntary dismissal would have triggered the \$100,000 contractual obligation. The debtor would have been obliged to pay the claimant even under conditions where the amount due could not possibly have been earned under a deferred compensation plan.

The facts in this case support this conclusion. The claimant worked under the letter agreement for but a year and three months. His salary was \$100,000 per annum. Yet the debtor would have us believe that within the space of this short employment period the claimant really earned not his pro rata salary of \$125,000 for such period but \$225,000, almost double that amount.

OPINION OF BABITT, J., BANKRUPTCY JUDGE

Moreover, the Tax Regulations developed under Section 404(a) of the Internal Revenue Code, 26 U.S.C. Section 404(a) (1970 ed.), clearly distinguish severance pay from deferred compensation. Section 404(a) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, profit sharing or any other plan of deferred compensation. Severance pay is not included. The Tax Regulations, on the other hand, define severance pay as payments to which an employee has no rights unless he is laid off. Tax Reg. Section 1.404(a)-1(2) provides:

"Section 404(a) does not apply to a plan which does not defer the receipt of compensation. Furthermore, Section 404(a) does not apply to deduction for contributions under a plan which is solely a dismissal wage... For example, if under a plan, an employer contributes 5% of each employee's compensation per month to a fund out of which employees who are paid off will be paid benefits for temporary periods, but employees who are not laid off have no rights to such a plan, such a plan is an unemployment benefit plan, and the deductibility of the contributions to it is determined under Section 162.

The letter agreement here gives the claimant no right to compensation unless the debtor terminates the

OPINION OF BABITT, J., BANKRUPTCY JUDGE

employment. Hence such compensation is a dismissal wage, in this case severance pay, not deferred compensation.

I, of course, do not wish to imply that the payment due under the letter agreement, incurred post-petition, was not constructed with the tax advantages of deferred compensation in mind. The agreement calls for payments over a two year period. The debtor thus gains from the easing of its cash flow problem, the claimant from the lowering of his tax bracket. Deferred compensation is thus unquestionably a moving force behind the two year payment period. But, the point remains, payment of severance pay incurred post-petition may still be disbursed in a manner which also reaps the tax advantages of deferred compensation but without concluding that the obligation to pay is therefore deferred compensation.

Nor is the debtor aided by Alpert v. New York. New Haven & Hartford Ry. Co., 348 F.2d 304 (2d Cir. 1965). There, the company's former chief executive officer claimed that payments to be made by the debtor at the conclusion of the officer's employment contract were substituted pension payments incurred post-petition and therefore entitled to

OPINION OF BABITT, J., BANKRUPTCY JUDGE

priority. The employment contract which expired by its terms pre-petition, called for annual payments of \$25,000 for twelve years following such expiration. The annual salary during the work period of Alpert's contract was only \$60,000. The court's conclusion that the contract provided for deferred compensation and therefore was a liability incurred pre-petition is clearly supported by the contract's reasonable relationship of work done to payments ultimately made -- a relationship so utterly lacking in the letter agreement in the dispute here.

Unlike the statutory treatment in straight bankruptcy, Section 70(b), a debtor in possession may only reject an executory contract by affirmative action under Section 313(1) of the Act, 11 U.S.C. Section 713(1), read with Chapter XI Rule 11-53 or under Section 357(2) of the Act, 11 U.S.C. 757(2). 8 Collier on Bankruptcy (14th ed.) Section 3.15(6). Unless so rejected, the contract continues in effect. Smith v. Hill, 317 F.2d 539 (9th Cir. 1963) citing 8 Collier on Bankruptcy, ibid. Clearly, then, the transformation of a debtor into a debtor in possession on the filing of the Chapter XI petition does not terminate

OPINION OF BABITT, J., BANKRUPTCY JUDGE

executory contracts in effect prior to the petition. To hold, as the debtor insists, that all pre-petition contracts fall on the filing would render Section 313(1) meaningless and indeed, would run contrary to the realities. And not even recognition that the Chapter XI debtor in possession is "not the same entity as the pre-bankruptcy company", Shopmen's Local Union No. 455, et al. and N.L.R.B. v. Kevin Steel Products, Inc., ____ F.2d____ (2d Cir. July 24, 1975), slipsheet opinion, p. 5111, can comfort the debtor here, for it clearly "assumed" the Zelin employment after it became debtor in possession until it was felt his services were needed no longer and he was let go. Since the letter agreement was executory, calling as it did for future performance by the claimant employee, In re Schulte Retail Stores Corp. 105 F.2d 986, 987-88 (2d Cir. 1939); In re Crayson-Robinson Stores, Inc., 321 F.2d 500, 502 (2d Cir. 1963), the debtor asserts that a Chapter XI filing constitutes a discharge of all the company's employees. Hence, argues the debtor, the subsequent local Rule XI-3 approval of the claimant's employment constitutes a new rehiring agreement, apart from the letter agreement. Since the Rule XI-3 order did not include severance pay, the debtor goes on, claimant

OPINION OF BABITT, J., BANKRUPTCY JUDGE

is not entitled to such pay.

Whatever the merits of Capital Service, that case held only that a Chapter XI filing terminates an employment contract by operation of California law. The employment contract having thus terminated by operation of that state law, no executory contract existed to be rejected.

Ibid. at 434. Cf. 8 Collier on Bankruptcy (14th ed.) 13.15(3). That case did not hold, as the debtor contends, that a Chapter XI filing terminates an employment contract under Section 313(1) of the Act, 11 U.S.C. Section 713(1), nor as has been explained, could it have so held.

New York law on the other hand has long held insolvency or bankruptcy to be no excuse for the failure to fulfill one's contractual obligations. 407 East 61st Street Garage v. Savoy Fifth Ave. Corp., 23 N.Y. 2d 275, 281-82 (1968). Hence, in New York, the employment contract remains executory and effective after the Chapter XI filing until affirmatively rejected under Section 313(1) of the Act. Not having been rejected prior to the discharge of the claimant, the letter agreement will continue to hold the debtor liable for severance pay thus incurred post-petition.

OPINION OF BABITT, J., BANKRUPTCY JUDGE

Rule XI-3 of the Bankruptcy Rules for the Southern and Eastern Districts of New York provides that:

"No compensation shall be paid to the debtor . . . or to an officer, stockholder or director of a corporation if (debtor is) a corporation, from the time of the filing of a petition until confirmation of the arrangement unless a prior order of court shall have been obtained approving the employment and fixing compensation".

Pursuant to that Rule, the amount of claimant's compensation was fixed by court order on December 7, 1973. This order concededly, contained no provision for severance pay. Counsel for the debtor now argues that severance pay being compensation for employment, such pay was not court approved for compensation, and that the letter agreement calling for severance pay must be deemed rejected under Section 313(1) of the Act.

The weakness in this argument is that severance pay is not compensation for employment but for the termination of employment; severance pay is not wages, but damages. As the court said in Straus-Duparquet, supra, at 651:

OPINION OF BABITT, J., BANKRUPTCY JUDGE

"Severance pay is a form of compensation for the termination of the employment relation, for reasons other than the displaced employee's misconduct, primarily to alleviate the consequent need for economic readjustment but also to recompense him for certain losses attributable to the dismissal."

Since Local Rule XI-3 was not designed to include provisions for severance pay, no inference of rejection of the letter agreement is to be drawn from the silence on that issue in the order of December 7, 1973.

Moreover, a review of the facts in this case does not support the construction of the December 7th order as a rejection. The compensation fixed by the order was exactly the same as in the letter agreement. Neither of the parties to the agreement acted as though the old working arrangement was terminated and a new one substituted. Indeed, the issue of rejection was never raised until the debtor objected to the claimant's claim some eight months after the December 7th order was entered. To hold under these facts that the December 7th order constituted an automatic rejection would not only be contrary to Congress' scheme for rejection, but would also go against the grain of this court's application of principles consistent with its being, as it

OPINION OF BABITT, J., BANKRUPTCY JUDGE

has been reminded again and again, a court of equity.

Bank of Marin v. England, 385 U.S. 99 (1966).

The conclusion is, to me, irresistible, that what was meant for the claimant is severance pay for the termination of his employ before the term of such employment had run.

It follows, therefore, despite the debtor's somewhat strained reading of Straus-Duparquet, that that case controls here.

The debtor insists that Straus-Duparquet is really a restatement of the Congressional policy which gives wages of employees a second priority under Section 64a(2) of the Act, 11 U.S.C. Section 104(a)(2), while, at the same time, denying the same treatment to officers of the debtor such as is the claimant here. A careful reading of Straus-Duparquet fails to suggest any support for this view for two reasons:

First, Section 64a(2) deals with employee wages. Severance pay is not classified as wages but as damages under Straus-Duparquet. For this reason alone, that case could not have been a restatement of Section 64a(2).

OPINION OF BABITT, J., BANKRUPTCY JUDGE

Second, no mention of Section 64a(2) is made at all in connection with severance pay by Straus-Duparquet. Instead the court there spoke of administration expenses under Section 64a(1) as follows:

"Since severance pay is compensation for termination of employment and since the employment of these claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such an expense."

I therefore conclude that the claim here under objection is entitled to the status of an administration expense during the Chapter XI period and is therefore to be accommodated as are similarly classified claims.

Submit Order.

Dated: New York, New York
August 26, 1975

/s/ Roy Babitt
Bankruptcy Judge

ORDER OF BABITT, J. OVERRULING OBJECTIONS
AND ALLOWING CLAIM #2246 AS AN EXPENSE OF
ADMINISTRATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

73 B 1206

of

UNISHOPS, INC.,

ORDER OVERRULING OBJECTIONS
AND ALLOWING CLAIM #2246 AS
AN EXPENSE OF ADMINISTRATION

Debtor

Jerome Zelin, having duly filed his proof of claim
for the sum of \$100,000 as an expense of administration and
objections to the status, but not the amount, of that claim
having been duly filed, and a hearing on those objections
having been duly held,

And having heard Aranow, Brodsky, Bohlinger,
Benetar & Einhorn, attorneys for Jerome Zelin, George
Natanson, Esq., of counsel, in support of the claim; and
Levin & Weintraub, attorneys for the Debtor, Elias Mann, Esq.
and Daniel Zimmerman, Esq., of counsel, in support of the
objections thereto; and due deliberation having been had,
and the opinion of the Court having been duly filed, it is

O R D E R E D, that said claim of Jerome Zelin

ORDER OF BABITT, J. OVERRULING OBJECTIONS
AND ALLOWING CLAIM #2246 AS AN EXPENSE OF
ADMINISTRATION

be and it hereby is allowed in full, in the sum of
One Hundred Thousand Dollars, as an expense of administration
of the debtor in possession, to be paid in the same manner as
all other claims similarly classified.

Dated: New York, N.Y.

September 4 , 1975.

IS/ _____
Bankruptcy Judge

NOTICE OF APPEAL OF UNISHOPS, INC. TO
DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

UNISHOPS, INC.
Debtor

UNISHOPS, INC.,
Appellant,
v.

JEROME ZELIN
Appellee

NOTICE OF APPEAL TO DISTRICT COURT

UNISHOPS, INC., the above-named debtor, appeals to the District Court from the order of the Honorable Roy Babitt, Bankruptcy Judge, entered in this case on the 4th day of September, 1975, allowing the claim of Jerome Zelin in the sum of \$100,000 as an expense of administration of the debtor in possession.

The parties to the order appealed from is the appellee, Jerome Zelin and his attorneys are the firm of Aranow, Brodsky, Bohlinger, Benetar & Einhorn, 469 Fifth Avenue, New York, New York 10017.

New York, New York

September 9th, 1975

LEVIN & WEINTRAUB
Attorneys for Appellant

By Elias Mann
225 Broadway
New York, N.Y. 10007
(212) 962-3300

OPINION OF GRIESA, J. IN DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In the Matter :
-of- : 73 B 1208
UNISHOPS, INC., :
Debtor. : OPINION
-----X
Objection to Claim No. 2246 of :
Jerome Zelin :
-----X

GRIESA, J.

This is an appeal from an order of Bankruptcy Judge Babitt allowing the \$100,000 claim of Jerome Zelin as an expense of administration of the debtor in possession in a Chapter XI proceeding. The effect of this order is to give this claim priority under 11 U.S.C. § 104(a)(1), and to permit payment of the claim in full. The debtor in possession concedes the amount of the claim, but contends that it should be treated as a general claim. It appears that, as a general claim, payment of less than 50% would be made.

OPINION OF GRIESA, J. IN DISTRICT COURT

The order of the Bankruptcy Judge is reversed.

I hold that Zelin's claim is not entitled to priority.

I.

The source of the claim in question is a letter agreement dated March 19, 1973, between the debtor, Unishops, Inc., and Zelin. The agreement provided for severance pay in the event that Zelin's employment as "Chief Operating Officer" of Unishops should cease. It was agreed that, in the event Zelin's employment terminated for any reason other than death or voluntary resignation, Unishops would pay Zelin \$50,000 per year for a period of two years, or a total of \$100,000. It should be noted that this agreement did not deal with any subject relating to Zelin's employment other than severance pay.

On November 30, 1973 Unishops filed a Chapter XI petition in this court. After the filing, Unishops, as debtor in possession, continued Zelin in its employ. On December 5, 1973 an application was made to Judge Babitt for approval of officers' compensation pursuant

OPINION OF GRIESA, J. IN DISTRICT COURT

to Bankruptcy Rule XI-3 of this court. This rule provides:

"Rule XI-3 -- Compensation to Debtor

"No compensation shall be paid to the debtor, if an individual, or to the members of a copartnership, if a copartnership, or to an officer, stockholder or director of a corporation, if a corporation, from the time of the filing of the petition until confirmation of the arrangement unless a prior order of the court shall have been obtained approving the employment and fixing the compensation."

Among the materials submitted on the application was a description of Zelin as Vice Chairman of the Board and Chief Operating Officer, and the duties performed by him. Approval was requested for payment of Zelin's salary in the amount of \$100,000 per year. No request was made for approval of any severance pay. On December 7, 1973 Judge Babitt entered an order approving officers' salaries, including the \$100,000 per year for Zelin. It appears that this was Zelin's salary prior to the filing of the Chapter XI petition. There was no reference in the order to severance pay.

On or about July 16, 1974 the debtor in possession discharged Zelin. This resulted in Zelin's claim for \$100,000 severance pay pursuant to the letter agreement of March 19, 1973.

OPINION OF GRIESA, J. IN DISTRICT COURT

II.

Judge Babitt, in holding that the \$100,000 termination benefit should be classified as an administration expense, relied upon Straus-Duparquet, Inc. v. Local Union No. 3, 386 F.2d 649 (2d Cir. 1967). In that case, certain employees were discharged by a debtor in possession shortly after the filing of the Chapter XI petition. A union collective bargaining agreement, entered into prior to the filing of the Chapter XI petition, provided for severance pay. The Court of Appeals held that the severance pay was an administration expense, stating (386 F.2d at 651):

"Since severance pay is compensation for termination of employment and since the employment of these claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such an expense."

Judge Babitt also held that Local Rule XI-3 did not require court approval of Zelin's severance pay, because such pay was not "compensation" within the meaning of that rule.

OPINION OF GRIESA, J. IN DISTRICT COURT

III.

The relevant definition of debts entitled to priority is contained in 11 U.S.C. § 104(a)(1) as follows:

"§ 104. Debts which have priority

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition;..."

Where a debtor has an executory contract dealing with compensation of employees, and where that contract continues in effect after the commencement of Chapter XI proceedings, compensation due for services performed during such proceedings is considered an expense of administration within the meaning of the statute. Where such a contract continues in effect, and provides for severance pay, and where discharge of employees occurs during the pendency of Chapter XI proceedings, severance pay is considered an administration expense. Straus-Duparquet, Inc. v. Local Union No. 3, 386 F.2d 649 (2d Cir. 1967).

OPINION OF GRIESA, J. IN DISTRICT COURT

However, an executory contract, made by a debtor prior to the filing of a Chapter XI proceeding, does not automatically continue in effect during the Chapter XI proceeding. The debtor in possession is considered a new juridical entity. Brotherhood of Railway, etc. v. REA Express, Inc., 523 F.2d 164, 170 (2d Cir. 1975), cert. denied, U.S. (1975),

U.S. (1976). There is a procedure for moving for formal rejection of executory contracts. 11 U.S.C. § 713(1). The language of the Second Circuit opinions is to the effect that a debtor in possession is not bound by a pre-existing executory contract unless it is "assumed" either expressly or impliedly. Brotherhood of Railway, etc. v. REA Express, Inc., supra at 170; Shopmen's Local etc. v. Kevin Steel Products, Inc., 519 F.2d 698, 704 (2d Cir. 1975).

The Southern District of New York has a specific rule which, in effect, establishes the procedure for determining whether executory contracts for the compensation of officers of a debtor corporation will continue in effect during a Chapter XI proceeding. This is local Bankruptcy Rule XI-3, quoted

OPINION OF GRIESA, J. IN DISTRICT COURT

earlier in this opinion. This rule provides that, in a Chapter XI proceeding, no compensation shall be paid to an officer of a corporation following the filing of the petition unless a specific court order approves the employment and fixes the compensation. The necessary effect of this rule is that no executory contracts regarding officers' compensation are binding on the debtor in possession unless they are specifically approved by the court.

The question on the present appeal is whether the March 19, 1973 agreement regarding Zelin's severance pay was an agreement dealing with compensation, thus requiring court approval under Rule XI-3. Judge Babitt held that the March 19, 1973 agreement did not deal with compensation, stating that "severance pay is not compensation for employment but for the termination of employment; severance pay is not wages, but damages."

I am constrained to disagree with Judge Babitt's interpretation of Rule XI-3. This rule refers to officers' compensation in general, and clearly covers severance pay, whether such pay is

OPINION OF GRIESA, J. IN DISTRICT COURT

thought to be compensation for employment or, in the words of the Second Circuit in the Straus-Duparquet case, "compensation for termination of employment." Severance pay was unquestionably intended to be a form of compensation for Zelin as an officer of Unishops.

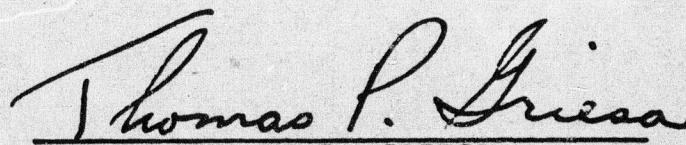
Moreover, as a matter of policy, the same degree of court scrutiny under Rule XI-3 should be given to officers' severance pay as to any other form of officers' compensation. There are the same dangers in either case that the officers of a corporation will arrange payments for themselves which unfairly prejudice the rights of general creditors.

Conclusion

The decision and order of Bankruptcy Judge Babitt allowing Zelin's claim for severance pay as an administrative expense are reversed.

So ordered.

Dated: New York, New York
August 2, 1976



Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

NOTICE OF APPEAL OF JEROME ZELIN TO
UNITED STATES COURT OF APPEALS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

UNISHOPS, INC.,

Debtor

Objection to Claim 2246 of
Jerome Zelin

Notice is hereby given that Jerome Zelin, the Claimant above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from an order in the above entitled proceeding, made by Hon. Thomas P. Griesa, United States District Judge, dated and entered August 2, 1976, which reversed an order of Hon. Roy Babitt, Bankruptcy Judge, which had allowed the claim of said Jerome Zelin as an expense of administration.

Dated: August 6, 1976.

NATANSON, REICH & BARRISON
Attorneys for Jerome Zelin,
Appellant

By

/S/
George Natanson, a Member
of the Firm
655 Third Avenue
New York, N.Y. 10017
Telephone: (212) 490-3470

TO: LEVIN & WEINTRAUB
Attorneys for Unishop, Inc. Appellee
255 Broadway, New York, N.Y. 10007
Telephone: (212) 962-3300

Hon. Raymond F. Burghardt
Clerk of the above Court

Received 9/10/75
Copy submitted
Lgw - sub
Ed. from
atyp for Appellee